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No. 15-1256

In the Supreme Court of the United States

SHANNON NELSON AND LOUIS ALONZO MADDEN,
Petitioners,

v.

COLORADO,
Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

BRIEF IN OPPOSITION FOR THE STATE OF COLORADO

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QUESTION PRESENTED

The Colorado Supreme Court held that state courts lack statutory authority to require a refund of court costs, fees, or restitution when a defendant's conviction is overturned on appeal. The court concluded that Colorado's Exoneration Act is the only source of statutory authority for a defendant in Petitioners' position to obtain reimbursement of costs, fees, and restitution. Petitioners have not sought relief under the Act and did not challenge its constitutionality below.

The question presented is:

Should this Court grant certiorari to review the constitutionality of a state law statutory procedure that has never been directly challenged?

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STATEMENT OF THE CASE

I. Petitioner Nelson

Trial, appeal, and retrial. Nelson was charged with forty counts of sexual assault against her four minor children. Pet. App. 51a. The jury convicted her on five counts. *Id.* The court sentenced Nelson to a prison term and—as is required by statute—ordered her to pay court costs, fees, and restitution. *Id.* The purpose of the restitution order was to pay for mental health therapy for the children. *Id.* at 72a. Nelson did not contest the restitution order, and while she was incarcerated, the Department of Corrections withheld approximately $700 from her inmate account to be used toward these payments. *Id.* at 51a.

On direct appeal of Nelson's conviction, the Colorado Court of Appeals reversed and remanded for a new trial because the trial court had allowed the prosecution to call an unendorsed expert witness. *People v. Gonser*, No. 06CA1023, 2009 WL 952492 (Colo. App. Apr. 9, 2009) (unpublished). On retrial, the jury acquitted Nelson on all counts. Pet. App. 51a.

Request for return of funds. Following her acquittal, Nelson filed a motion in her criminal case asking for return of the funds withheld from her inmate account. *Id.* The motion included a single sentence mentioning due process. It argued primarily that return of the funds was required by state statutes.

The court held a hearing, at which Nelson's counsel conceded that the court had no authority to order victims to return restitution funds. *Id.* at 71a. He argued instead that the prosecutor should be ordered to refund the money. *Id.* There was no mention of due

process. The trial court rejected Nelson's argument, concluding that none of the funds had been "wrongfully taken" because at the time they were withdrawn from her inmate account, Nelson had been convicted and her conviction not yet reversed. *Id.* at 72a. The court found that the restitution funds had already been disbursed to pay for the children's mental health therapy and held that it lacked authority to order the prosecution or the Colorado Department of Corrections to refund the money. *Id.* at 73a.

Colorado Court of Appeals decision. The court of appeals reversed, holding that a defendant whose conviction is overturned on appeal is entitled to seek a refund in the trial court when there is a subsequent acquittal or a decision not to retry the defendant. *Id.* at 50a. The court concluded that any order for restitution, fees, and costs must be vacated when a conviction is overturned because "there is no valid conviction to which any such restitution, fees, and costs may be tied." *Id.* at 54a. Although the court acknowledged that its decision implicated public policy issues within the province of the legislature, it nonetheless remanded the case for the trial court to "consider on the merits" defendant's motion for a refund of the restitution she had paid. *Id.* at 62a–63a.

Colorado Supreme Court decision. The Colorado Supreme Court reversed, holding that the trial court had no statutory authority to issue a refund of restitution, costs, or fees. *Id.* at 1a. The court concluded that a defendant can seek return of those payments through a petition under Colorado's Exoneration Act, but noted that because Nelson did not file such a petition, the Act "does not apply to this case." *Id.* at

12a. The majority reasoned that—just as courts must follow statutory commands in imposing and disbursing fees—courts may authorize refunds from public funds only pursuant to statutory authority. *Id.* at 17a. Only the Exoneration Act specifically addresses when a defendant who was wrongfully convicted may seek a refund of costs, fees, and restitution. *Id.* at 20a. To recover under the Act, a defendant must prove that she was "actually innocent" of the charged crime, which means she "must show either that her conviction was the result of a miscarriage of justice or that she is factually innocent." *Id.* at 12a.

One justice dissented, arguing that the court of appeals was correct and that a trial court had authority to order a refund through its "ancillary jurisdiction." *Id.* at 30a. He contended that the Exoneration Act does not provide sufficient process for defendants in Nelson's situation because it (1) puts the burden on the petitioner to prove her actual innocence by clear and convincing evidence, (2) is not geared toward refunds, but to compensation for wrongful incarceration, and (3) is impractical for seeking small refunds if defendants must retain a lawyer. *Id.* at 28a–29a.

In response to the dissent, the majority concluded that requiring a defendant in Nelson's position to seek a refund through the civil process created by the legislature, rather than by motion in the criminal court, does not violate due process. *Id.* at 20a–22a.

II. Petitioner Madden

Trial, appeal, and postconviction proceedings. Madden was charged with attempted patronizing of a prostituted child and attempted sexual assault. The charges were based on allegations that he propositioned a 14-year-old girl who was a passenger on the trolley he was driving, then pinned her against a window and masturbated on her stomach. PR. Tr. 7/23/01 pp. 189–200; Tr. 7/24/01, pp. 216–17; Tr. 7/25/01, pp. 500–01. He was convicted and initially given an indeterminate sentence, as well as ordered to make restitution payments to cover the victim's mental health therapy expenses. Pet. App. 37a. Madden did not challenge the restitution order and paid approximately $2,000 in fees and restitution. *Id.* at 37a–38a.

On direct appeal, the court of appeals affirmed the conviction for attempted patronizing but reversed the attempted sexual assault conviction. *People v. Madden*, 87 P.3d 153 (Colo. App. 2003). The Colorado Supreme Court came to the opposite conclusion, affirming Madden's attempted sexual assault conviction but reversing as to the attempted patronizing count. *People v. Madden*, 111 P.3d 452 (Colo. 2005). On remand, the trial court imposed a three-year prison sentence with credit for time served. Pet. App. 37a.

Madden then filed a *pro se* postconviction motion, alleging ineffective assistance of trial counsel. The trial court granted the motion because Madden's attorney failed to object to inadmissible evidence and injected evidence of Madden's guilt into the trial. PR. CF, vol. 2, pp. 296–305, 337–42. The district attorney elected not to appeal the order or retry the case. Pet. App. 37a.

Motion for return of funds. Madden requested a refund of the approximately $2,000 in costs, fees, and restitution that he had paid. *Id.* at 38a. The trial court ordered that the costs and fees be refunded, but denied the motion as to restitution. *Id.* at 75a. The court expressed concern that the counseling service that received the restitution payments, if required to reimburse Madden, would sue the victim or the victim compensation board for payment. The court considered this to be an unjust result where Madden's conviction was only reversed because his attorney had been ineffective. *Id.* at 75a–76a.

Decisions on appeal. The court of appeals reversed, relying on its earlier decision in *Nelson*, which the supreme court had not yet reversed. *See id.* at 64a. The Colorado Supreme Court granted certiorari and reversed both the *Nelson* and *Madden* cases on the same day, holding that a trial court has no statutory authority to issue a refund of restitution, costs, or fees, and that a defendant in Madden's position may only seek such a refund through a petition under Colorado's Exoneration Act. *Id.* at 36a.

REASONS FOR DENYING THE PETITION

I. This Court should not adjudicate a claim that was not adequately raised in the lower courts and that is based on a theory that Petitioners did not articulate until after the Colorado Supreme Court issued its opinion.

Petitioners ask this Court to adjudicate a new claim based on a due process theory they did not litigate in the state courts. Specifically, they ask the Court to address in the first instance an as-applied challenge to whether Colorado's Exoneration Act violates the Due Process Clause. This Court should deny certiorari review because: (1) Petitioners did not seek relief under the Act, (2) Petitioners did not present their current argument to the lower courts, and (3) accepting Petitioners' argument could harm the ability of State governments to respond appropriately to exonerations.

A. Because Petitioners did not seek relief under the Exoneration Act, there is not an adequate basis to evaluate their claim that it violates due process.

Petitioners insist that, because they are required to seek relief via the Exoneration Act, they have been deprived of sufficient meaningful process. Pet. 12–13. Yet because Petitioners never petitioned for relief under the Act, Petitioners' theory that the Act violates due process as applied to them has never been tested in the Colorado courts. This significant vehicle problem counsels against a grant of certiorari here.

Nor is there a body of Colorado case law interpreting or applying the Exoneration Act that could assist this Court in resolving the question presented. No lower court decision has analyzed the procedural aspects of the Act—including how it would apply to a defendant seeking a refund of costs, fees, and restitution. The Colorado Supreme Court majority concluded that the Act "provides sufficient process for defendants to seek refunds of costs, fees, and restitution," Pet. App. 20a, but that conclusion must be viewed in light of the court's recognition that "because [Petitioners] did not file a claim under the Act, it does not apply to this case." *Id.* at 12a; *see also id.* at 44a n.4.

Because they never availed themselves of the process provided by the Act, Petitioners' due process argument *presumes* that they would have been—and that other similarly situated defendants would be—unsuccessful in seeking relief under the Act. This presumption is not only untested through any attempt by Petitioners to obtain relief under the statute, but is unsupported by judicial interpretation or application of the statute. This Court generally does not weigh in on an issue—particularly as to the interpretation and application of a state statute—for the first time or in the absence of well-developed analysis in the lower courts, and it should not do so here.

B. In the lower courts, Petitioners focused on state-law budgetary and jurisdictional issues and did not adequately develop a due process argument.

Petitioners did not argue their current theory in the lower courts, and the court of appeals opinions did not mention either the Exoneration Act or due process. *See id.* at 50a–69a.[1] They were based instead on a particular reading of Colorado's restitution and court costs statutes: the court reasoned that since Colorado's statutes only authorize restitution and costs where there is a conviction, the statutes implicitly empower trial courts to order refunds where a conviction is reversed and not reinstated. The Colorado Supreme Court rejected that interpretation of the statutes.

The Exoneration Act was first discussed in briefing before the Colorado Supreme Court, although even there Petitioners did not make a due process argument. Instead, Petitioners' briefing centered on the purely state-law questions of (1) whether a trial court retains jurisdiction in a criminal case to order a refund of restitution, costs, and fees following reversal of a conviction, and (2) if so, whether any refund that is ordered should be paid out of the budget of the executive or the judicial branch. *See* Opp. App. at 7, 34–52.

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[1] Petitioner Nelson cited the due process clause in the "Applicable Law" section of her opening court of appeals brief, but she made no further argument or mention of it. *See* Opp. App. at 2–5. Petitioner Madden's court of appeals briefs do not refer to due process at all. *See id.* at 27–32.

The due process argument that Petitioners now raise for the first time is based on the opinion of the lone dissenter in the Colorado Supreme Court. The majority briefly discussed the due process issue. Pet. App. 20a–22a. But the focus of the opinion was on state law questions. Because Petitioners did not meaningfully develop their due process argument in the state courts—and have not (until now) argued that the Exoneration Act is unconstitutional as applied to them—a grant of certiorari would require this Court to address for the first time an issue that was not litigated by the parties below. The Court should decline to do so.

C. Considering the constitutionality of Colorado's exoneration statute, when Petitioners have not yet attempted to invoke it, could have detrimental consequences for other States.

Each State has its own unique constitutional provisions and statutes relating to costs, fees, and restitution—not to mention budgetary issues and separation of powers. For this Court to precipitously weigh in on Petitioners' untested claims, in the absence of well-developed arguments and decisions in the lower courts, could lead to the unintended consequence of requiring States to make drastic changes to a broad range of statutes and state funding mechanisms.

For example, more than half the States have some form of exoneration compensation statutes.[2] These statutes are intended to assist those who are wrongfully convicted and exonerated. Yet States may be reluctant to initiate, develop, or reform these and similar laws if they know this Court may pass judgment on the constitutionality of Colorado's, even where the complaining parties have not sought relief under it. A decision by this Court imposing a constitutional limit on States' ability to require defendants to follow the procedures outlined in their exoneration statutes would upset the delicate balance of these state laws, and this Court should decline to decide that question in a case where the Petitioners have neither attempted to comply with the procedures in the Act nor adequately litigated the Act's constitutionality in the lower courts.

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[2] Ala. Code § 29-2-150; Cal. Penal Code § 4900; Conn. Gen. Stat. Ann. § 54-102; D.C. Code § 2-421; Fla. Stat. Ann. § 961.03; 705 Ill. Comp. Stat. Ann. 505/8(C); Iowa Code Ann. § 663a.1; La. Rev. Stat. Ann. § 15:572.8; Me. Rev. Stat. Ann. tit. 14, § 8241; Md. Code Ann., State Fin. & Proc. § 10-501; Mass. Gen. Laws Ann. Ch. 258d, § 1; Minn. Stat. § 590.11; Miss. Code Ann. § 11-44-1; Mo. Ann. Stat. § 650.058; Mont. Code Ann. § 53-1-214; Neb. Rev. Stat. § 29-4608; N.H. Rev. Stat. Ann. § 541-B:14; N.J. Stat. Ann. § 52:4c-1; N.Y. Jud. Ct. Act § 8-B; N.C. Gen. Stat. Ann. § 148–82; Ohio Rev. Code Ann. § 2743.48; Okla. Stat. Ann. tit. 51, § 154; Tenn. Code Ann. § 9-8-108; Tex. Civ. Prac. & Rem. Code Ann. § 103.051; Utah Code Ann. § 78b-9-405(1)(A); Vt. Stat. Ann. tit. 13, § 5572; Va. Code Ann. § 8.01-195.10; W. Va. Code Ann. § 14-2-13a(B); Wa. Rev. Code Wash. (ARCW) § 4.100; Wis. Stat. Ann. § 775.05.

II. Petitioner's treatment of the case law is inaccurate: Colorado is not an outlier and its approach is not contrary to traditional practice.

Contrary to Petitioners' arguments, *see* Pet. 19–23, the decision below is not an outlier in need of correction. Many jurisdictions limit the procedures and circumstances by which a defendant whose conviction has been overturned can recover payments he or she made in connection with the conviction. For example, appellate courts in Wisconsin and Michigan have agreed that because a court cannot order a money judgment against the state absent statutory authority, an improper restitution order can be vacated only *prospectively*. *See, e.g., State v. Minniecheske*, 590 N.W.2d 17, 19–20 (Wis. Ct. App. 1998) (holding that although the trial court had jurisdiction to "remove the restitution order from the judgment of conviction," it lacked authority to order a money judgment against the State for a refund of wrongly collected restitution); *State v. Duerst*, 1999 Wisc. App. LEXIS 886, *6 (Wis. Ct. App. Aug. 12, 1999) (unpublished) (relying on *Minniecheske* to conclude that a criminal court lacked authority to order the State to refund money collected under an improper restitution order; instead, the defendant must file a "separate civil suit"); *People v. Diermier*, 531 N.W.2d 762, 763 (Mich. App. 1995) (declining to order a refund of restitution where the county "simply acted as a conduit in channeling defendant's restitution payments to the victim" and "had no statutory duty to refund it to defendant").

Indeed, for four other reasons, Colorado's approach to the issue presented does not make it an outlier.

First, Colorado—like other jurisdictions—distinguishes between an acquittal or dismissal based on a "wrongful conviction," which is considered "void," and a conviction that is simply "voidable." *See Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961) (where guilty plea was "void" because it was entered in violation of due process rights, defendant must be placed in status quo by a refund);[3] *First Nat'l Bank v. Fleisher*, 2 P.3d 706, 713 n.5 (Colo. 2000) (judgment is "void" only if court lacked subject matter or personal jurisdiction or acted in a manner inconsistent with due process of law). A void conviction is one that is invalid from its inception because it is illegal or unconstitutional, whereas a conviction may be voidable and reversed on appeal for any number of reasons unrelated to the defendant's actual guilt, such as procedural defects. The Colorado Supreme Court's decisions below established that as to voidable convictions (like Petitioners'), defendants must rely on the Exoneration Act for a refund of payments made in connection with the conviction.

This is similar to the line drawn in other jurisdictions between "void" and "voidable" convictions. *See, e.g.*, *Hoult v. Hoult*, 57 F.3d 1, 6 (1st Cir. 1995) ("A judgment is not void simply because it is or may have been erroneous; it is void only if, from its inception, it was a legal nullity."); *State v. Oney*, 993 N.E.2d 157, 165 (Ind. 2013) ("[T]he question of whether a conviction was either 'void' or 'voidable' is no mere semantic quibble. While a void judgment is one that, from its

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[3] The Colorado Supreme Court decisions in Petitioners' cases did not overrule or reject *Toland*; rather, the court distinguished it on its facts. *See* Pet. App. 20a n.5. *Toland* remains good law.

inception, is a complete nullity and without legal effect, a voidable judgment is not a nullity until superseded, reversed, or vacated."); *see also, e.g.*, *Ex parte Gibson*, 31 Cal. 619, 624–25 (Cal. 1867); *People v. Hubbard*, 964 N.E.2d 646, 647 (Ill. App. Ct. 2d Dist. 2012); *State v. Payne*, 873 N.E.2d 306, 311–12 (Ohio 2007); *State v. McDonnell*, 176 P.3d 1236, 1240 (Or. 2007); *Hickman v. State*, 153 S.W.3d 16, 20 (Tenn. 2004); *Ex parte Seidel*, 39 S.W.3d 221, 224 (Tex. Crim. App. 2001); *Commonwealth v. Davis*, 36 Va. Cir. 120, 121 (Va. Cir. Ct. 1995).

Colorado's approach is also consistent with federal cases finding refunds appropriate when a defendant suffers a "wrongful conviction," as opposed to a conviction that is reversed followed by an acquittal on retrial. *See Telink, Inc. v. United States*, 24 F.3d 42, 45–46 (9th Cir. 1994) (discussing the availability of a refund where the defendant had been convicted under an insufficient indictment); *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) (discussing refund of fines imposed following guilty pleas where the criminal statute was found to be unconstitutional); *United States v. Venneri*, 782 F. Supp. 1091, 1094–95 (D. Md. 1991) (same).

The importance of the void/voidable distinction is evident in a federal district court case on which Petitioners rely, *United States v. Lewis*, 342 F. Supp. 833 (E.D. La. 1972). *See* Pet. 22. That case is inapposite to Petitioners' cases, not only because it addressed a refund of "fines"—not costs, fees, or restitution—but because the defendant's exoneration came when the Act under which the defendant was convicted was declared unconstitutional. *Id.* at 836. Because the

conviction was therefore void—not merely voidable—the refund ordered in that case does not support Petitioners' argument that a refund is required as to their *voidable* convictions.

Second, although Petitioners are correct that a handful of states have specific statutes governing refunds for wrongful convictions, that does not make Colorado an outlier. *See* Pet. 19–20. In fact, it only confirms the Colorado Supreme Court's holding that legislation is required to authorize a refund of payments. Moreover, the state statutes that Petitioners cite would apply only partially—if at all—to payments in cases similar to Petitioners'. None of the cited statutes would provide a refund of restitution, and only one of the cited statutes would apply to provide a refund of courts costs; another would apply to provide a refund of fees. Pet. App. 19–20.[4]

Third, the authorities that Petitioners cite are distinguishable. Many of them are irrelevant to the question addressed by the Colorado Supreme Court because they involve separate civil cases, not proceedings in the criminal court.[5] Similarly, many of Petitioners' criminal-case authorities are

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[4] Tex. Code Crim. Proc. Art. 103.008(a) (providing for refund of costs); Miss. Code Ann. § 99-19-73 (12) (providing for refund of fees).

[5] *See* Pet. 16–17 (citing *Arkdelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 145 (1919); *Baltimore & Ohio R. Co. v. United States*, 279 U.S. 781, 786 (1929); *Haebler v. Myers*, 30 N.E. 963, 964 (N.Y. 1892); Restatement (First) of Restitution § 74; William A. Keener, *A Treatise on the Law of Quasi-Contracts* 417 (1893)).

distinguishable because they address only "fines" (criminal penalties), rather than costs, fees, or restitution—which are not criminal penalties. Pet. 18, 20–21.[6]

As for the state cases in the Petition that *do* involve a refund of restitution—of which there are only three—all are distinguishable. *See id.* at 21. In *Bogard v. State*, the Arkansas court concluded that because the defendant was found not guilty of the charged offense, restitution had been improperly ordered. 450 S.W.3d 690, 692 (Ark. Ct. App. 2014). That is inapposite here, as both Nelson and Madden were convicted of the charges for which payments were ordered. In *Commonwealth v. McKee*, the Pennsylvania court found statutory and rule authority for issuing a refund. 38 A.3d 879, 881 (Pa. Super. Ct. 2012). No such authority exists in Colorado. And in *Cooper v. Gordon*, the conviction was reversed due to the prosecution's alleged failure to disclose impeachment material. *See Cooper v. State*, 377 So.2d 1153, 1155 (Fla. 1979). In that context, the Florida court addressed the question of whether a trial court retains jurisdiction to consider a motion for return of funds—including both fines and other kinds

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[6] *See United States v. Rothstein*, 187 F. 268, 269 (7th Cir. 1911); *Devlin v. United States*, 12 Ct. Cl. 266, 272–73 (1876); *Merkee v. Rochester*, 13 Hun. 157, 162 (N.Y. Sup. 1878); *People ex. Rel. McMahon v. Board of Auditors*, 49 N.W. 921 (Mich. 1879)(unpublished opinion); *Telink*, 24 F.3d at 47; *Lewis*, 478 F.2d at 836. Although two of Petitioners' cases addressed court costs, *N.J. Soc'y for Prevention of Cruelty to Animals v. Knoll*, 71 A. 116, 116–17 (N.J. 1908); *Lucas v. Commonwealth*, 41 Pa. C.C. 673, 675 (Pa. Ct. of Comm. Pleas 1914), that is hardly sufficient to constitute an established "tradition" that is contrary to Colorado's approach.

of payment—after the criminal charges are dismissed on remand. *Cooper v. Gordon*, 389 So. 2d 318, 319 (Fla. Ct. App. 1980). The court's affirmative answer to that question does not directly contradict the decisions of the Colorado Supreme Court below.

Fourth, Petitioners cite federal cases authorizing a refund of costs, fees, or restitution, Pet. at 20–23, but those cases are inapposite. In addition to the distinctions mentioned above, the federal courts' stated basis for authorizing refunds is the federal All Writs Act, which is broader than Colorado's All Writs Act in that it does not require constitutional or statutory authority to empower the issuance of a writ. *Compare* 28 U.S.C. § 1651(a) (providing that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law") *with* Colo. Rev. Stat. § 13-1-115 ("The courts have power to issue all writs necessary and proper to the complete exercise of the power conferred on them by the constitution and laws of the state."). Because the source of federal power to issue attendant writs is broader than Colorado's, and because of Colorado's express limitations on writs, federal cases granting refunds do not support Petitioners' claims.[7]

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[7] Nor do all the federal decisions reach the result Petitioners favor. At least one circuit has concluded that where the federal government collects and disburses restitution to a victim, the defendant has no right to recover such payments even if the conviction is overturned and charges are dismissed before retrial. *See United States v. Hayes*, 385 F.3d 1226, 1229–30 (9th Cir. 2004) ("[T]he government merely served as an escrow agent pending the final judgment and at the proper time paid the funds over to the victims.").

III. Although they should not be addressed on the limited record before the Court, Petitioners' arguments are flawed on the merits.

Even if Petitioners were correct about Colorado's approach being unique, their assertion that the Act violates due process fails on the merits. Contrary to Petitioners' arguments, the payments at issue here are not "penalties" that must be overturned along with convictions; nor do the requirements of the Exoneration Act violate due process.

A. Costs, fees, and restitution are not monetary penalties that must be overturned when convictions are reversed.

Petitioners' due process argument hinges upon their repeated characterization of restitution, costs, and fees as "monetary penalties" or "criminal penalties." They argue that such payments are part of the punishment for a crime and therefore must be overturned when a conviction is reversed. Pet. 9–12, 14–15. That argument fails.

Petitioners cite several federal court decisions in support of their characterization, *Id.* at 20–22, but those are not determinative because the nature and purpose of payments associated with a conviction is an issue of *state* law. *See Auto-Owners Ins. Co. v. Smith*, 547 B.R. 774, 779 (E.D. Mich. 2016) ("It is not for a federal bankruptcy court to determine that full restitution in this case does not provide any societal or state benefit or any penal or rehabilitative ends - the

sovereign state of Michigan has already determined that it does.").[8]

In Colorado, court costs and fees are not punitive; rather, they are intended to offset the costs of prosecuting or rehabilitating the defendant. *See, e.g.*, *People v. Noel*, 134 P.3d 484, 487 (Colo. App. 2005) (probation supervision fees are not refundable when a conviction is reversed because the purpose of probation is primarily rehabilitative); *People v. Howell*, 64 P.3d 894, 899 (Colo. App. 2002) (costs are imposed to reimburse the state for the actual expenses incurred in prosecuting a defendant and are not punitive); *People v. McQuarrie*, 66 P.3d 181, 183 (Colo. App. 2002) (costs and surcharges are not a form of punishment). They are thus not "monetary penalties" as Petitioners argue.

Whether restitution is a "monetary penalty" is a more difficult question in Colorado, but the better view is that restitution is compensatory for victims, rather than punitive. That conclusion is supported by both the applicable statutes and case law.

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[8] To the extent that federal decisions are relevant, three federal circuits have concluded that criminal restitution is not a penalty or punishment. *See United States v. Wolfe*, 701 F.3d 1206, 1218 (7th Cir. 2012) ("[R]estitution is not a criminal penalty."); *United States v. Millot*, 433 F.3d 1057, 1062 (8th Cir. 2006) (stating that restitution orders "are not in the nature of a criminal penalty"); *United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007) (restitution under a federal statute "does not inflict criminal punishment, and thus is not punitive"); *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005) ("[R]estitution is not criminal punishment.").

With respect to statute, restitution is not described as a punishment or penalty; rather, the text of the governing statute confirms that the purposes of restitution in Colorado are primarily compensatory and remedial—not punitive—and that restitution orders are intended to remain in force for the benefit of victims. Colorado's restitution statute states that restitution is a way to "lessen the financial burdens inflicted upon [victims and] to compensate them for their suffering and hardship," as well as a mechanism "for the rehabilitation of offenders" and to "aid the offender in reintegration as a productive member of society." Colo. Rev. Stat. § 18-1.3-601. The statute further provides that a restitution order "shall be a final civil judgment in favor of the state and any victim" and that "[n]otwithstanding any other civil or criminal statute or rule, any such judgment shall remain in force until the restitution is paid in full." *Id.* § 18-1.3-603(4)(a).

The weight of Colorado case law confirms the plain text of the restitution statute. Both the Colorado Supreme Court and the Colorado Court of Appeals have recognized that the purpose of restitution is to "make the victim of the criminal offense whole." *People v. Borquez*, 814 P.2d 382, 385 (Colo. 1991); *People v. McCann*, 122 P.3d 1085, 1087 (Colo. App. 2005) ("The purpose of restitution is to make the victim whole."); *see also People v. Estes*, 923 P.2d 358, 360 (Colo. App. 1996) (concluding that the purpose of restitution is to facilitate "repayment of the actual pecuniary damage the victim sustains as the direct result of the defendant's conduct").

Although in the double jeopardy context, the court of appeals has concluded that restitution can be considered punitive, *see, e.g.*, *People v. Harman*, 97 P.3d 290, 293 (Colo. App. 2004); *People v. Shepard*, 989 P.2d 183, 186–87 (Colo. App. 1999),[9] in other contexts, the court of appeals has distinguished restitution from punitive measures like fines and monetary penalties because it is not simply a punishment, but "serves to make the victim whole." *See People v. Stafford*, 93 P.3d 572, 574 (Colo. App. 2004) ("[F]or purposes of Eighth Amendment analysis, restitution is not the equivalent of a fine. A fine is solely a monetary penalty, while restitution serves to make the victim whole."); *People v. Cardenas*, 262 P.3d 913, 915 (Colo. App. 2011) ("[R]equiring defendant to pay postjudgment interest on the restitution amount is ... not a fine .... [A] fine is solely a monetary penalty, but postjudgment interest is a statutory mechanism designed to achieve the legislature's goal of making victims whole by encouraging defendants to pay restitution promptly.").

In the key case of *People v. Daly*, the court of appeals considered whether a restitution order should be abated when the defendant dies while a direct appeal from the conviction is pending. 313 P.3d 571 (Colo. App. 2011). It concluded that even though the defendant's death "renders the whole proceeding a nullity" such that the conviction itself must be abated

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[9] The Colorado Supreme Court has not approved these decisions or squarely addressed whether restitution can be considered punitive. In *People v. Woodward*, the supreme court granted certiorari to address the question of whether restitution constitutes "punishment" for *ex post facto* purposes, but ultimately found it unnecessary to decide the issue. 11 P.3d 1090, 1093 (Colo. 2000).

ab initio, restitution orders—unlike fines or other monetary penalties—remain in place despite the defendant's death. *Id.* at 573–74. That is because restitution "is more compensatory in nature than penal." *Id.* at 574–75 (quoting *United States v. Christopher*, 273 F.3d 294, 299 (3d Cir. 2001)). The court emphasized that in Colorado, the legislature has "expanded the right [to restitution] beyond a simple sentencing condition by mandating that restitution orders create final civil judgments." *Id.* at 576. Finally, the court noted that restitution is not limited to damage caused by the charged conduct but can include losses caused by acts that were not the subject of the criminal charges: "Although a restitution order can only be entered to compensate a victim for losses caused by a defendant's criminal conduct after a defendant has been convicted of a crime, a restitution order may properly include losses a victim incurred resulting from a defendant's uncharged acts." *Id.* at 577.

Thus, even though Colorado courts have held that restitution may be considered punitive in the limited context of the restriction on double jeopardy, the weight of the authority establishes that restitution serves different purposes and is treated differently than fines and other criminal penalties in Colorado. A restitution order creates a civil judgment in favor of the injured victim, and payments are made to the victim, not the state. *See* Colo. Rev. Stat. § 18-1.3-603(4)(a). Just as restitution is not automatically abated in the event of a defendant's death, *Daly*, 313 P.3d at 578, or when charges are dismissed after the expiration of a deferred judgment, *see* Colo. Rev. Stat. § 18-1.3-603(4)(a), neither is restitution a monetary penalty

that must be refunded by the state upon reversal of a conviction.[10]

B. The requirements of the Exoneration Act do not violate due process.

The Exoneration Act does not violate the Due Process Clause in requiring a defendant whose conviction has been overturned to file a separate petition and to prove his or her entitlement to a refund by clear and convincing evidence.

It is telling that Petitioners do not cite a single on-point decision to support their argument that the Act violates due process. Rather, they argue by analogy to the return of monies collected under an unconstitutional tax. Pet. 11–12. But that analogy is flawed: a tax that is prohibited by the Constitution is very different from a restitution order under a conviction—after the full protections of trial—that is reversed on appeal. Convictions may be reversed for any number of reasons, ranging from actual innocence, to constitutional error, to lawyer or jury misconduct, to technical legal errors at trial. *See id.* at 15 (asserting that "[m]ost grounds for reversal involve legal errors that took place at trial"). Yet a conviction is only "wrongful" if the defendant is actually innocent of the charged crime. *See* 2013 Colo. Sess. Laws 2412 ("[A]n innocent person who has been wrongly convicted ... has

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[10] Even if Petitioners were correct that costs, fees, and restitution are monetary penalties, that would not undermine the Colorado Supreme Court's conclusion that trial courts lack statutory authority to order a refund of such payments. Nor would that trigger a requirement as a matter of constitutional law that the payments be automatically refunded.

been uniquely victimized."); Colo. Rev. Stat. § 13-65-103(2)(e)(V) (requiring compensation of exonerated persons in case of "wrongful conviction"); *see also Kansas v. Marsh*, 548 U.S. 163, 210 n.7 (2006) (citing with approval *People v. Smith*, 708 N.E.2d 365, 371 (Ill. 1999) ("[W]hile a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous.... Rather, [a reversal of conviction] indicates simply that the prosecution has failed to meet its burden of proof.")).

Here, the Colorado Supreme Court correctly held that in Petitioners' cases—where the convictions were not void or abated *ab initio* but were instead reversed based on a violation of evidentiary rules (as to Petitioner Nelson) and ineffective assistance of counsel (as to Petitioner Madden)—the "money that [wa]s withheld pursuant to clear statutory authority while a conviction is in place [wa]s not wrongfully withheld." Pet. App. 43a; *see also Daly*, 313 P.3d at 577–78 (upholding a restitution order even when the conviction was abated due to the defendant's death because "when the civil judgment here was created, there was a criminal conviction, and the court had issued a restitution order based on that conviction").

The Exoneration Act provides a clear process for those who have been wrongfully convicted to petition for relief, including for a refund of payments made in connection with the conviction. Due process requires "notice and the opportunity for a meaningful hearing before an impartial tribunal." *Van Sickle v. Boyes*, 797 P.2d 1267, 1273–74 (Colo. 1990) (citing *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976)). The process provided by the Exoneration Act satisfies these

requirements, *see* Colo. Rev. Stat. § 13-65-102, although Petitioners chose not to avail themselves of that process. Nor does it violate the Constitution that Colorado's General Assembly chose to condition relief under the Act on satisfying a "clear and convincing" evidentiary burden. Of the 30 jurisdictions that provide some mechanism for compensation of exonerated persons, 15 of them require a showing of actual innocence by clear and convincing evidence.[11] None of those statutes have been found to violate due process.

The conclusion that the Act provides sufficient process is not undermined by Petitioners' speculation that defendants (and their lawyers) will be unwilling to follow the procedures in the Act "because the sums involved are typically too small to justify the expense of a full-blown civil trial." Pet. 13. That argument assumes not only that the petitions will be contested, *see* Colo. Rev. Stat. § 13-65-102(5)(d), (6)(a) (discussing uncontested petitions), but that the ability to recover attorney fees for a successful petition is inadequate incentive for any lawyer to bring such cases. *See id.* § 13-65-103(2)(e)(IV). Petitioners provide no evidence to support such a theory, and it does not establish a violation of due process.

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[11] Colo. Rev. Stat. § 13-65-102(6)(b); D.C. Code § 2-421; Fla. Stat. Ann. § 961.03; Iowa Code Ann. § 663a.1; La. Rev. Stat. Ann. § 15:572.8; Me. Rev. Stat. Ann. tit. 14, § 8241; Mass. Gen. Laws Ann. Ch. 258d, § 1; Neb. Rev. Stat. § 29-4608; N.J. Stat. Ann. § 52:4c-1; N.Y. Jud. Ct. Act § 8-B; Okla. Stat. Ann. tit. 51, § 154; Utah Code Ann. § 78b-9-405(1)(A); Wa. Rev. Code Wash. (ARCW) § 4.100; W. Va. Code Ann. § 14-2-13a(B); Wis. Stat. Ann. § 775.05.

Petitioners seek to impose a constitutional rule requiring every jurisdiction to automatically refund payments associated with a conviction when the conviction is overturned on appeal, regardless of the reason for the reversal. Although a legislature may choose to implement such a standard, *see* Pet. 19–20 (citing state statutes that provide for refunds), it is not required by the Constitution. The Colorado Supreme Court correctly concluded that the process provided by the Exoneration Act satisfies constitutional requirements.

CONCLUSION

The petition for certiorari should be denied.

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APPENDIX

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APPENDIX 1

COURT OF APPEALS, STATE OF COLORADO
101 West Colfax Avenue, Suite 800
Denver, CO 80202

Case Number: 11CA1206

[Filed October 11, 2011]

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee,	)
v.	)
SHANNON NELSON, Defendant-Appellant.	)

Arapahoe County District Court
Case No. 04CR0652
Hon. Marilyn L. Antrim, Judge

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OPENING BRIEF

STATEMENT OF THE ISSUE

I. Whether the district court erroneously denied the defendant-appellant's motion for return of restitution payments she made prior to the reversal of her conviction and subsequent acquittal in this matter.

* * *

SUMMARY OF THE ARGUMENT

I. The district court erroneously denied Ms. Nelson's motion for return of restitution payments she made prior to the reversal of her conviction and subsequent acquittal in this matter because failing to return the money Ms. Nelson previously paid would be contrary to the legislative intent of the statutes providing for such payments.

ARGUMENT

I. The district court erroneously denied the defendant-appellant's motion for return of restitution payments she made prior to the reversal of her conviction and sentence in this matter.

A. Standard of Appellate Review and Record Reference

The proper construction of a statute is a question of law that must be reviewed *de novo*. People v. Manzo, 144 P.3d 551 (Colo. 2006); Fendley v. People, 107 P.3d 1122 (Colo. App. 2004). A district court has broad discretion to determine a restitution order's terms and conditions, and an appellate court will review for an

abuse of discretion. People v. Pagan, 165 P.3d 724 (Colo. App. 2006).

In this case, the district court denied Ms. Nelson's Motion for Return of Payments By Ms. Nelson Prior To Reversal of Judgment and Acquittal. (CD, 04CR652 Gonser, pp. 5.)

B. Applicable Law

When construing a statute, courts must ascertain and give effect to the intent of the General Assembly. Fendley v. People, 107 P.3d 1122 (Colo. App. 2004). To determine the General Assembly's intent in enacting a statute, courts look first to the plain language of the statute and interpret statutory terms in accordance with their commonly accepted meaning. Id. Courts must read and consider a statute as a whole "to give consistent, harmonious, and sensible effect to all of its parts." People v. Hernandez, 160 P.3d 263 (Colo. App. 2007). Courts may not adopt a construction that renders any word superfluous. Id. When the plain language of a statute is free from ambiguity, other rules of statutory construction are unnecessary. Id.

In Colorado, trial courts must order restitution payments for the benefit of the party immediately and directly aggrieved by a defendant who is convicted of a criminal act. C.R.S. §18-1.3-205; C.R.S. §18-1.3-602. Payment of restitution is authorized only as to the victim of a defendant's conduct, and only for the actual pecuniary damage the victim sustained as the direct result of the defendant's conduct. People v. Borquez, 814 P.2d 382 (Colo. 1991); People v. Robb, 215 P.3d 1253 (Colo. App. 2009).

C.R.S. §24-4.2-104(1)(a)(I) permits a surcharge to be levied on criminal actions only when resulting in conviction or in a deferred judgment and sentence, to be transmitted for credit to the victims and witnesses assistance and law enforcement fund. Likewise, C.R.S. §24-4.1-119(1)(a) permits a cost to be levied on criminal actions only when resulting in conviction or in a deferred judgment and sentence, to be transmitted for credit to the crime victim compensation fund. Furthermore, C.R.S. §13-32-105 permits docket fees to be assessed in criminal actions in the amount of $30 and an additional $5 surcharge, payable only when there is a conviction of the defendant. However, C.R.S. §16-18-101(1) requires costs in criminal cases to be paid by the state when a defendant is acquitted. No person shall be denied property without due process of law. U.S. Const. Amend. V and XIV §1; Colo. Const. Art. II §25.

C. Facts and Analysis

In Ms. Nelson's case, the Court of Appeals reversed her judgment of conviction after her first trial, thereby reversing all previous sentencing orders, which included orders to pay restitution and other fines, fees, and costs. Furthermore, after Ms. Nelson's second trial, the jury acquitted her of all remaining charges, so that she was not convicted of any crime in this matter. Accordingly, Ms. Nelson cannot be ordered to pay *any* restitution, court costs, victims' compensation fund fees, victims' assistance surcharges, or time payment fees related to the charges in this case.

Here, Ms. Nelson paid a total of $681.35 while her first appeal was pending. Now that she has been acquitted of all charges, the amount she previously

paid must be returned to her. Under the circumstances of this case, failing to return the money Ms. Nelson previously paid toward restitution and other fines, fees, and costs would be contrary to the legislative intent of the statutes providing for such payments. Even the prosecution in this case acknowledged that returning Ms. Nelson's payments to her "makes sense," but the prosecution asserted that "there is, unfortunately, not a mechanism to reverse" the payments. (CD, 04CR652 Gonser, pp. 2.) To the contrary, the "mechanism" by which the payments would be reversed is an order by the district court for the return of all payments Ms. Nelson previously made. Accordingly, the district court should have granted Ms. Nelson's Motion for Return of Payments, and the court abused its discretion by failing to do so.

CONCLUSION

For the foregoing reasons, this Court of Appeals should reverse the district court's denial of Ms. Nelson's Motion for Return of Payments By Ms. Nelson Prior To Reversal of Judgment and Acquittal.

Respectfully submitted this 11th day of October, 2011.

/s/ _____

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APPENDIX 2

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

Case Number: 13SC495

[Filed December 8, 2014]

THE PEOPLE OF THE STATE OF COLORADO, Petitioner,	)
v.	)
SHANNON NELSON, Respondent.	)

Court of Appeals, State of Colorado
Case No. 11CA1206

Arapahoe County District Court
Case No. 04CR0652

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ANSWER BRIEF

STATEMENT OF THE ISSUES

I. Whether a criminal court has jurisdiction to order a refund of costs, fees, and restitution from the State upon defendant's post-conviction motion in the criminal case following either his acquittal or his conviction being vacated and the prosecution electing not to retry him.

II. Where the court of appeals ordered the State to refund restitution, which branch of the government is responsible for the refund.

* * *

SUMMARY OF THE ARGUMENT

A criminal court has jurisdiction to order a refund of costs, fees, and restitution from the State upon defendant's post-conviction motion in the criminal case following either the defendant's acquittal or his/her conviction being vacated and the prosecution electing not to retry him/her. Such a refund of the money previously paid is consistent with the legislative intent of the statutes providing for such payments.

Where the court of appeals ordered the State to refund restitution, the executive branch is responsible for the refund of court costs and fees pursuant to section 16-18-101, C.R.S. (2012), while both the executive and judicial branches could be responsible for the refund of restitution via the Victim Compensation Fund and the judicial collection enhancement fund.

ARGUMENTS

I. A criminal court has jurisdiction to order a refund of costs, fees, and restitution from the State upon defendant's post-conviction motion in the criminal case following either his acquittal or his conviction being vacated and the prosecution electing not to retry him.

A. Standard of Appellate Review and Record Reference

The question of whether a district court has the authority to order a refund of restitution, fees, and costs previously paid presents a question of law that appellate courts review *de novo*. See People v. Pino, 262 P.3d 938, 940 (Colo. App. 2011). Likewise, the proper construction of a statute is a question of law that must be reviewed *de novo*. People v. Manzo, 144 P.3d 551 (Colo. 2006); Fendley v. People, 107 P.3d 1122 (Colo. App. 2004).

In this case, Ms. Nelson preserved this issue by filing a Motion for Return of Payments By Ms. Nelson Prior To Reversal of Judgment and Acquittal, which the district court denied. (PR, CF, Vol. 4, pp. 854-858; R. Tr. 5/5/11, pp. 5.)

B. Applicable Law

Pursuant to the Colorado Constitution, "district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate, and criminal cases." Colo. Const. art VI, §9(1). As courts of general jurisdiction, the district courts in Colorado have the authority to consider questions of law and of equity and to award legal and

equitable remedies. Ashton Props., Ltd. v. Overton, 107 P.3d 1014, 1017 (Colo. App. 2004). The courts have power to issue all writs necessary and proper to the complete exercise of the power conferred on them by the constitution and laws of this state. §13-1-115, C.R.S. (2012).

When construing a statute, courts must ascertain and give effect to the intent of the General Assembly. Fendley v. People, 107 P.3d 1122 (Colo. App. 2004). To determine the General Assembly's intent in enacting a statute, courts look first to the plain language of the statute and interpret statutory terms in accordance with their commonly accepted meaning. Id. Courts must read and consider a statute as a whole "to give consistent, harmonious, and sensible effect to all of its parts." People v. Hernandez, 160 P.3d 263 (Colo. App. 2007). Courts may not adopt a construction that renders any word superfluous. Id. When the plain language of a statute is free from ambiguity, other rules of statutory construction are unnecessary. Id.

In Colorado, trial courts must order restitution payments for the benefit of the party immediately and directly aggrieved by a defendant who is convicted of a criminal act. §18-1.3-205, C.R.S. (2012); §18-1.3-602, C.R.S. (2012). Payment of restitution is authorized only as to the victim of a defendant's conduct, and only for the actual pecuniary damage the victim sustained as the direct result of the defendant's conduct. People v. Borquez, 814 P.2d 382 (Colo. 1991); People v. Robb, 215 P.3d 1253 (Colo. App. 2009).

Section 24-4.2-104(1)(a)(I), C.R.S. (2012), permits a surcharge to be levied on criminal actions only when resulting in conviction or in a deferred judgment and

sentence, to be transmitted for credit to the victims and witnesses assistance and law enforcement fund. Likewise, section 24-4.1-119(1)(a), C.R.S. (2012), permits a cost to be levied on criminal actions only when resulting in conviction or in a deferred judgment and sentence, to be transmitted for credit to the crime victim compensation fund. Furthermore, section 13-32-105, C.R.S. (2012), permits docket fees to be assessed in criminal actions in the amount of $30 and an additional $5 surcharge, payable only when there is a conviction of the defendant. Section 16-18-101(1), C.R.S. (2012), requires costs in criminal cases to be paid by the state when a defendant is acquitted.

In June 2013, the Colorado General Assembly passed the Compensation for Certain Exonerated Persons Act, which established a civil claim for relief whereby "a person who has been convicted of a felony in this state and sentenced to a term of incarceration as a result of that conviction and has served all or part of such sentence . . . may be eligible for compensation . . . upon a finding that the person was actually innocent of the crime for which he or she was convicted." §13-65-102(1)(a), C.R.S. (2013). Under the Act, a person may file a petition for compensation only after a court has vacated or reversed all convictions in the case based on reasons other than legal insufficiency of evidence or legal error unrelated to the petitioner's actual innocence, and after (a) an order of dismissal of all charges or (b) an acquittal of all charges after retrial. §13-65-102(2)(a), C.R.S. (2013).

In addition to compensation for years of wrongful incarceration, the Act entitles an exonerated person to compensation for "the amount of any fine, penalty,

court costs, or restitution imposed upon and paid by the exonerated person as a result of his or her wrongful conviction or adjudication. This subparagraph (V) shall not be interpreted to require the reimbursement of restitution payments by any party to whom the exonerated person made restitution payments as a result of his or her wrongful conviction or adjudication." §13-65-103(2)(e)(V), C.R.S. (2013).

Pursuant to the Act, the petition shall name the state of Colorado as the respondent, and the attorney general and the district attorney of the judicial district in which the case originated shall each have a separate and concurrent authority to intervene as parties to a petition. §13-65-102(5)(b), C.R.S. (2013). If a district court determines a person to be eligible to receive compensation pursuant to the Act, the district court shall direct the state court administrator to compensate an exonerated person. §13-65-103(1), C.R.S. (2013). The Act is funded by general-fund appropriations allocated to the judicial department. See 2013 Colo. Sess. Laws 2426-27; see also Long Bill HB 14-1336, pp. 118.

C. Facts and Analysis

In Ms. Nelson's case, the Court of Appeals reversed her judgment of conviction after her first trial, thereby reversing all previous sentencing orders, which included orders to pay restitution and other fines, fees, and costs. Furthermore, after Ms. Nelson's second trial, the jury acquitted her of all remaining charges, so that she was not convicted of any crime in this matter. Accordingly, Ms. Nelson cannot be ordered to pay any restitution, court costs, victims' compensation fund fees, victims' assistance surcharges, or time payment

fees related to the charges in this case, and the district court had jurisdiction to order a return of all funds she previously paid.

1. Costs and Fees

Here, the Court of Appeals properly relied on the Colorado Supreme Court's decision in Toland v. Strohl, 147 Colo. 577, 364 P.2d 588 (1961), in holding that Ms. Nelson "was entitled to seek, and the district court was authorized to award, a refund of the fees and costs that Nelson paid in connection with her now overturned conviction." People v. Nelson, 2013 COA 58 ¶16. The Toland court held that when a conviction is vacated, the parties should be "placed in *status quo* by refund to the defendant of the sums paid as fine and costs." Toland, 147 Colo. at 586, 364 P.2d at 593.

Nevertheless, in the Opening Brief, the People assert that "since costs are part of the judgment of conviction, it makes sense that a defendant who is acquitted does not pay for costs of *that* trial, but there is still no provision in the costs statutes for a refund of the first trial where defendant was convicted." (Op. Brf. at 13.) To the contrary, section 24-4.1-119(1)(a) permits a cost to be levied on criminal actions only when resulting in conviction or in a deferred judgment and sentence, to be transmitted for credit to the crime victim compensation fund. Section 16-18-101(1) requires costs in criminal cases to be paid by the state when a defendant is acquitted. Where a judgment of conviction is reversed, the accompanying sentence, which includes imposition of costs, is also reversed. Accordingly, the clear intent of these statutes is that a defendant is not required to pay costs and fees when he or she is ultimately acquitted of a crime, regardless of

when the acquittal occurs. Therefore, the Court of Appeals properly held that defendants in Ms. Nelson's position are entitled to a refund of all fees and costs previously paid in connection to a conviction which is subsequently overturned.

2. Restitution

Furthermore, the Court of Appeals properly held that "in addition to her right to seek a refund of the fees and costs that she paid, Nelson is entitled to seek, and the district court is authorized to award, a refund of the restitution that Nelson paid in connection with her overturned conviction." People v. Nelson, 2013 COA 58 ¶21. Where no published Colorado appellate decisions have addressed this issue, the Court of Appeals properly followed other jurisdictions which have held that defendants may seek refunds of restitution paid in connection with a conviction that is subsequently overturned.

For example, the Court of Appeals in this case cited Telink, Inc. v. United States, 24 F.3d 42, 47 (9th Cir. 1994), which held that if defendants prevail in setting aside their convictions, then wrongly paid fines would be "automatically refunded" without requiring a separate civil action. The Court of Appeals here also cited United States v. Beckner, 16 F. Supp. 2d 677, 679 (M.D. La. 1998), which held that the district court had jurisdiction "to carry out its obligation to completely vacate all aspects of the erroneous [judgment] issued by it," including payment of restitution. In following these other jurisdictions, the Court of Appeals in this case agreed with the reasoning that "the interests of justice make it imperative that the petitioner receive a refund

of his restitution." Citing United States v. Venneri, 782 F. Supp. 1091, 1093 (D. Md. 1991).

The interests of justice require a refund of restitution because when a conviction is reversed and a case is remanded for a new trial, there is no valid conviction to which any restitution may be tied. See People v. Scearce, 87 P.3d 228, 235 (Colo. App. 2003) (vacating a restitution order in connection with the reversal of a conviction on appeal). Since a district court is empowered to set aside a conviction, it should also correct the unlawful result of the conviction and require the repayment of any money collected as fines. See United States v. Lewis, 478 F.2d 835, 836 (5th Cir. 1973). Thus, where the prosecution has failed to prove beyond a reasonable doubt that a defendant is guilty of charged crimes, courts should allow the defendant to seek a refund of the restitution previously paid.

Nevertheless, the People assert in the Opening Brief that "the legislature has determined that in two particular circumstances, a restitution order may not be automatically vacated, even where the defendant's conviction does not stand," so that "there is not always a 'conviction' to which to tie the restitution order." (Op. 13 Brf. at 25-26.) However, the two circumstances in which a restitution order is kept in place despite the lack of a final conviction are: (a) when a defendant successfully terminates a deferred judgment and sentence, and (b) when a defendant dies before completion of his direct appeal. See HB14-1035; People v. Daly, 313 P.3d 571 (Colo. App. 2011). In both of these circumstances, the prosecution has still proven that the defendant's conduct is the cause of the victim's pecuniary damage, thus distinguishing these

circumstances from cases in which the judgment of conviction is reversed and the defendant is acquitted, such as in Ms. Nelson's case. Therefore, where a defendant's conviction is reversed and the defendant is subsequently acquitted or the prosecution elects not to retry him/her, the restitution order is automatically vacated and the defendant is entitled to a refund of any restitution he/she previously paid.

3. Ancillary Jurisdiction

Furthermore, where no published Colorado appellate decisions have addressed the mechanism by which a defendant may seek a refund of restitution, the Court of Appeals in this case properly followed other jurisdictions which have addressed this issue. The Court of Appeals cited numerous other jurisdictions which have held that a defendant who pays fines or restitution based on a conviction that is later set aside may seek a refund in the pending criminal case without having to file a separate civil action. See, e.g., Telink, 24 F.3d at 47 (where defendants prevail in setting aside their convictions, then wrongly paid fines would be automatically refunded without separate civil action); United States v. Lewis, 478 F.2d 835, 836 (5th Cir. 1973)(a person should not be required to resort to multiplicity of actions in order to obtain reimbursement of money to which he is entitled); Cooper v. Gordon, 389 So. 2d 318, 319 (Fla. Dist. Ct. App. 1980)(district court had jurisdiction to entertain defendant's motion for a refund of the fines, costs, and restitution that he paid before his conviction was reversed).

Moreover, the Court of Appeals in this case properly found guidance in the Colorado Supreme Court's decision in People v. Hargrave, 179 P.3d 226 (Colo.

App. 2007), while acknowledging that Hargrave is not directly on point. The Hargrave court held that the district court in a criminal proceeding had ancillary jurisdiction, or inherent power, to entertain the defendant's post-sentence motion for the return of seized property. Id. at 230. The Court of Appeals properly reasoned that the district court had ancillary jurisdiction over Ms. Nelson's motion for a refund of restitution because: (1) Nelson's refund petition arose from the same transaction that was the basis of the main proceeding; (2) her petition could be determined without a substantial new factfinding proceeding; (3) deciding her refund petition would not deprive any party of a substantial procedural or substantive right; and (4) Nelson's refund petition must be settled to ensure that the disposition of the underlying criminal proceeding will not be frustrated. People v. Nelson, 2013 COA 58 ¶25. Also, as the Court of Appeals concluded, judicial economy would be better served by allowing the refund of restitution, fees, and costs to be resolved in the criminal proceeding by the court that tried the case. Id. at ¶26. The Court of Appeals' reasoning in this case is sound and supported by other jurisdictions which have reached the same conclusion.

4. The Compensation for Certain Exonerated Persons Act

In the Opening Brief, the People focus on the requirement in the Compensation for Certain Exonerated Persons Act ("the Compensation Act") that a person must prove actual innocence in order to obtain a refund of costs, fees, and restitution, arguing that a person who does not prove actual innocence is not entitled to a refund of fines previously paid. (Op. Brf. at

18-19.) This argument is misplaced. It is logical that in order to be eligible for compensation in the amount of $70,000 for each year of wrongful incarceration pursuant to the Compensation Act, a person must establish that he or she was actually innocent of the crime for which he or she was convicted. §13-65-103(3)(a), C.R.S. (2013). In contrast, a person who simply seeks a refund of costs, fees, and restitution he/she previously paid after his/her conviction has been vacated need not establish actual innocence because these fines are based on a defendant's conviction or acquittal, not based on actual guilt or innocence. Thus, the recovery of wrongly paid fines and restitution is incident to the vacating and setting aside of a wrongful conviction, which is distinguished from the payment of compensation to persons who must establish they are actually innocent and have been wrongfully incarcerated.

Additionally, the People assert that federal cases have found a refund appropriate only "when a defendant suffers a 'wrong conviction,' as opposed to an acquittal on retrial." (Op. Brf. at 15.) However, the cases cited in support of this assertion do not involve claims of actual innocence; rather these cases involve convictions based on an insufficient indictment or an unconstitutional statute. See Telink, Inc. v. United States, 24 F.3d 42 (9th Cir. 1994) (convicted pursuant to an insufficient indictment); United States v. Lewis, 478 F.2d 835 (5th Cir. 1973) (guilty pleas entered pursuant to unconstitutional statute); United States v. Venneri, 782 F. Supp. 1091 (D. MD 1991) (convicted pursuant to unconstitutional statute). Contrary to the People's suggestion, these federal cases found

defendants were entitled to a refund of fines without requiring a finding of actual innocence.

Likewise, a person seeking compensation pursuant to the Compensation Act must file a separate civil action so that a district court can determine whether the person has established actual innocence and thereby eligible to receive compensation for each year of wrongful incarceration. However, a person should not be required to file a separate civil action merely for a refund of costs, fees, and restitution he/she previously paid because such payments are part of the original conviction and sentence, and the recovery of such payments is incident to the vacating of a wrongful conviction. Therefore, the Compensation Act does not prevent a non-exonerated person from obtaining a refund of previously paid costs, fees, and restitution.

5. Summary

In this case, Ms. Nelson paid a total of $681.35 while her first appeal was pending. Now that she has been acquitted of all charges, the amount she previously paid must be returned to her. The fact that she did not establish actual innocence is irrelevant, because the determination of whether she must pay fees, costs, and restitution is based on her conviction or acquittal, not based on actual guilt or innocence. Additionally, the fact that she filed the motion for refund after the order of acquittal was entered is not untimely, and eight months was a reasonable time after the judgment was entered to file the motion. See Hargrave, 179 P.3d 226 (holding that district court had ancillary jurisdiction to entertain defendant's post-sentence motion for return of seized property where defendant filed the motion seven months after he was

sentenced). Under the circumstances of this case, failing to refund the money Ms. Nelson previously paid toward restitution and other fines, fees, and costs would be contrary to the legislative intent of the statutes providing for such payments.

II. Where the court of appeals ordered the State to refund costs, fees, and restitution, the executive branch is responsible for the refund of court costs and fees, while both the executive and judicial branches could be responsible for the refund of restitution.

A. Applicable Law

Section 16-18-101(1), C.R.S. (2012), requires costs in criminal cases to be paid by the state when a defendant is acquitted. Additionally, pursuant to the Crime Victim Compensation Act, the Victim Compensation Board ("the Board") reimburses victims for expenses incurred due to the commission of a crime. See § 24-4.1-101, et seq., C.R.S. (2013). The Board is responsible for making compensation awards to crime victims for reasonable expenses proximately caused by a criminal act, the funds of which are derived primarily from surcharges paid by criminal defendants. See §§ 24-4.1-102(10)(a)(I), 24-4.1-103, 24-4.1-105, C.R.S. (2013). The awards are based on the Board's approval of each victim's application for compensation, and awards are not dependent on the defendant's conviction. See §§ 24-4.1-108, 24-4.1-112, C.R.S. (2013).

A district court may order restitution to be paid either (a) directly to the victim or (b) to the Board if the Board has paid a claim to a victim and the amount is collected and disbursed by either the Department of

Corrections or the Judicial Department's collections investigator. The court administrator of each judicial district maintains a Victim Compensation Fund for the benefit of eligible applicants, which is primarily funded by monies levied for victim compensation in the form of costs, surcharges, or federal monies. § 24-4.1-117(2), C.R.S. (2013). All money in the fund is to be used "solely for the compensation of victims." §24-4.1-117(5), C.R.S. (2013).

Additionally, defendants who are "assessed any fines, fees, costs, surcharges, or other monetary assessments with regard to the sentencing, disposition, or adjudication of a felony, misdemeanor, juvenile delinquency petition, petty offense, traffic offense, or traffic infraction" are subject to time payment fees and late payment fees. §16-11-101.6(1), C.R.S. (2013); §16-18.5-104, C.R.S. (2013). All time payment fees and late payment fees collected, as well as "reasonable costs incurred and collected by the state" are to be credited to the judicial collection enhancement fund. §16-11-101.6(2), C.R.S. (2013). The general assembly is required to make annual appropriations from the judicial collection enhancement fund to the judicial department "for administrative and personnel costs incurred in collecting restitution, fines, costs, fees, and other monetary assessments." Id.

B. Facts and Analysis

The Court of Appeals in the current case acknowledged that "in certain cases, the state may be required to refund monies that it has already disbursed to third parties (i.e., people and entities not controlled by the state)." People v. Nelson, 2013 COA 58 ¶28. The Court of Appeals properly concluded that such a result

is reasonable because (1) it was the state's action that ultimately resulted in the wrongful payment of restitution; (2) the state necessarily assumed the risk that the conviction could ultimately be overturned; (3) it is inappropriate for former criminal defendants to file lawsuits or other proceedings against crime victims to recover restitution; (4) it is more palatable for the state to recover restitution from crime victims and service providers; and (5) the risk of a wrongly paid restitution award should rest with the state, which collected the restitution funds but then ultimately failed to prove its case. Id. at ¶29-33.

The question of which branch of government should refund costs and fees is straightforward: the executive branch should refund costs and fees because pursuant to section 16-18-101, costs are to be paid by the state when a defendant is acquitted. Thus, when a defendant is acquitted after retrial, the prosecution must refund the costs previously paid by the defendant in order to put the parties "in *status quo*" because the prosecution is required to pay costs when a defendant is acquitted. Toland, 147 Colo. at 586, 364 P.2d at 593.

The issue of which branch of government should refund restitution is more complex. If the defendant originally paid restitution through the Victim Compensation Fund, then the executive branch should refund any restitution originally paid by the defendant, because the Victim Compensation Fund is administered by the district attorney's office. Restitution awards are based on the Victim Compensation Board's approval of each alleged victim's application for compensation, and may be awarded regardless of whether the defendant is convicted or

acquitted of the charged offenses and regardless of whether the defendant is ordered to pay restitution. See §24-4.1-108, C.R.S. (2012); §24-4.1-110, C.R.S. (2012). Thus, the legislature has expressed an intent to pay victims restitution from state funds when the defendant is not required to pay restitution because he or she has been acquitted. As such, it is reasonable for the state to bear the cost of refunding restitution previously paid by defendants whose convictions are later vacated.

Although the provisions governing the Victim Compensation Fund do not expressly authorize refunds to defendants, such refunds are properly implied by section 24-4.1-110(3), which states: "If a defendant is ordered to pay restitution . . . to a person who has received compensation awarded under this part 1, an amount equal to the compensation awarded shall be transmitted from such restitution to the board for allocation to the fund." This provision requires that when a person has received compensation from the Victim Compensation Fund before the defendant has been convicted and ordered to pay restitution, then any subsequent restitution must be transmitted to the Victim Compensation Fund. This provision suggests that in the reverse situation, when a person has received restitution from the defendant via the Victim Compensation Fund before the defendant is ultimately acquitted and the restitution order is vacated, then any previously paid restitution must be returned to the defendant from the Victim Compensation Fund.

If the defendant originally paid restitution directly to the alleged victim and is ultimately acquitted of the charged offenses, the defendant could still be refunded

any previously paid restitution from the Victim Compensation Fund, which would have awarded restitution to the alleged victim regardless of whether the defendant was convicted or acquitted. This would put the parties in *status quo* because the Victim Compensation Fund would have paid the restitution to the alleged victim even if the defendant had been originally acquitted.

Additionally, if the defendant originally paid restitution directly to the alleged victim and is ultimately acquitted of the charged offenses, then the judicial branch, which administers the judicial collection enhancement fund, could also refund any restitution the defendant previously paid. Although the judicial collection enhancement fund does not expressly provide for a refund of previously paid restitution, this fund could refund restitution because it is funded with fees paid by defendants who are "assessed any fines, fees, costs, surcharges, or other monetary assessments with regard to the sentencing, disposition, or adjudication of a felony, misdemeanor, juvenile delinquency petition, petty offense, traffic offense, or traffic infraction." §16-11-101.6(1). The People concede that the judicial department "could issue refunds to non-exonerated defendants" from the judicial collection enhancement fund "because it is the judicial department that collects and distributes the funds." (Op. Brf. at 32.)

The People claim that "notwithstanding [the Victim Compensation Fund and the judicial collection enhancement fund], there is no mechanism for the processing of such claims, other than that accessed through a civil suit" because "a trial court loses

jurisdiction over the case upon the entry of a final judgment." (Op. Brf. at 36.) To the contrary, district courts have "ancillary jurisdiction, or inherent power, to entertain defendant's post-sentence motion . . . and [conduct] a hearing if required, to enter orders resolving the matter." Hargrave, 179 P.3d at 230, citing People v. Rautenkranz, 641 P.2d 317, 318 (Colo. App. 1982). The Hargrave court ruled that there is a "significant distinction between challenging the conviction or sentence and requesting the return of property." Id. at 229. Here, Ms. Nelson is not challenging her conviction or sentence, but instead is requesting a refund of the fines she previously paid. Thus, the district court has ancillary jurisdiction to order a refund of previously paid costs, fees, and restitution after her acquittal upon retrial.

Furthermore, the People claim that Hargrave is factually distinguishable from the current case because "even when [Ms. Nelson] was acquitted upon retrial, she was not the rightful owner of the funds because the acquittal was not determinative of her restitution obligation." (Op. Brf. at 41.) This argument is without merit. It is indisputable that Ms. Nelson's acquittal upon retrial vacated her restitution obligation, thus making her the rightful owner of any restitution funds she wrongfully paid.

Where no published Colorado appellate decisions have addressed the issues raised in this matter, but other jurisdictions have addressed these issues, the Court of Appeals in this case properly followed other jurisdictions in holding that Ms. Nelson is entitled to seek, and the district court is authorized to award, a refund of the fees, costs, and restitution that Ms.

Nelson paid in connection with her overturned conviction. In general, the executive branch is responsible for the refund of costs and fees, while both the executive branch and the judicial branch could be responsible for the refund of restitution. Thus, this Supreme Court should affirm the Court of Appeals' opinion in this matter.

CONCLUSION

The district court had jurisdiction to order a refund of costs, fees, and restitution from the State based upon Ms. Nelson's post-conviction motion following her acquittal, and the executive branch should refund her costs and fees payments, as well as her restitution payments because restitution was paid through the Victim Compensation Fund. The Court of Appeals' reasoning and conclusion in this case are legally sound; therefore this Supreme Court should affirm the Court of Appeals' decision.

Respectfully submitted this 8th day of December, 2014.

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APPENDIX 3

COURT OF APPEALS,
STATE OF COLORADO

101 West Colfax Avenue, Suite 800
Denver, Colorado 80202
La Plata District Court
Honorable Jeffrey R. Wilson, Judge
Case Number 2000CR76

Case Number: 09CA2081

[Filed June 29, 2011]

THE PEOPLE OF THE STATE OF COLORADO	)
Plaintiff-Appellee	)
v.	)
Louis Madden	)
Defendant-Appellant	)

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OPENING BRIEF OF DEFENDANT-APPELLANT

INTRODUCTION

This case presents an issue of first impression in Colorado: when a defendant's conviction is subsequently vacated and the case is dismissed, whether justice requires – as it does for funds collected on subsequently vacated civil judgment – the return of funds paid as restitution.

STATEMENT OF THE ISSUES PRESENTED

When a civil judgment is subsequently vacated, money collected on the judgment must be refunded. Federal courts have similarly held that when a defendant's conviction is subsequently vacated, refunding the restitution he has paid is required in the interests of justice.

The court vacated Mr. Madden's conviction and dismissed the case but subsequently refused to order a refund of restitution.

Did the court err by refusing to order the restitution payments refunded?

* * *

SUMMARY OF THE ARGUMENT

When a civil judgment is subsequently vacated, money collected on the judgment must be refunded. And in criminal cases, federal courts have similarly held that when a defendant's conviction is subsequently vacated, refunding the restitution he has

paid is required in the interests of justice. The same result should obtain here.

ARGUMENT

Because the court vacated the conviction and dismissed the case, the interests of justice required refund of Mr. Madden's restitution payments.

Standard of Review

This issue is preserved for review because Mr. Madden litigated his claim for a refund of the restitution in the trial court. (vII p345-346; v4.13.09 p 2-4). As stated in the introduction, this case presents an issue of first impression in Colorado. Because the underlying facts are uncontroverted and the issue involves a pure legal determination, logic suggests this Court should review the issue de novo. *Corsentino v. Cordova*, 4 P.3d 1082, 1087 (Colo. 2000) (appellate courts review pure questions of law *de novo*) *citing People v. Romero*, 953 P.2d 550, 555 (Colo. 1998); *c.f. Lewis v. Lewis*, 189 P.3d 1134 (Colo. 2008) (equity decisions by lower court are reviewed de novo by appellate court); see also *Schaefer v. Schaefer*, 795 N.W.2d 494, 497 (Ia. 2011) (same).

Law and Analysis

This case appears to present an issue of first impression in Colorado: whether money collected under a restitution order in a criminal case should be refunded to the defendant when the basis for the restitution order – the criminal conviction – is vacated and the case is dismissed.

It is abundantly well-settled that when a civil judgment is reversed on appeal or by a post-judgment order, that any money paid in connection with the judgment must be refunded. *E.g., P.B. v. T.D.*, 561 N.E.2d 749,751 (Ind. 1990) ("When a party to an action pays a judgment that is later reversed on appeal, that party is entitled to restitution."); *Century Bank v. Hymans*, 905 P.2d 722, 726-727 (N.M.App. 1995) ("When a party pays a judgment and the judgment is then reversed or modified on appeal or by post-judgment order, the payor can obtain restitution without bringing a new action; it may move the trial or appellate court for relief, or the court may grant relief of its own initiative."); *West Suburban Bank v. Lattemann*, 674 N.E.2d 149, 151 (Ill.App. 1996) ("Upon the reversal of a judgment, a party that has received benefits from the erroneous judgment must make restitution."); *Moore v. Baugh*, 308 N.W.2d 698, 700 (Mich.App. 1981) ("[W]hen a judgment is reversed or set aside, the party who has received the benefit must make restitution to the other party.") citing 5 Am.Jur.2d, Appeal and Error, § 997, p. 424; *Spangler Inc. v. House of Heavilin, Inc.*, 394 S.W.2d 561 (Mo.App. 1965) (subsequent reversal of judgment destroyed basis upon which garnishment issued and entitled defendant to restitution regardless of merits of plaintiff's original claim, or fact that garnishor had made collection before reversal).

This well-settled principle of equity appears to be the rule in Colorado, as well. *Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149, 1153 (Colo.App. 1993) (observing that " . . .a person who has paid money to another in compliance with a judgment which is reversed or set aside is entitled to restitution. . .").

In *United States v. Venneri*[1], after the defendant's conviction was vacated (because it was based upon a statute determined to be unconstitutional), the court invoked the All Writs Act to order the victim to refund all the money it received from the defendant as restitution.[2] The Court held that justice compelled this

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[1] *United States v. Venneri*, 782 F.Supp. 1091, 1093 (D Md. 1991).

[2] The All Writs Act authorizes courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Venneri*, 782 F.Supp. at 1094, quoting 28 U.S.C. § 1651 (a). Thus, the court held that, notwithstanding the lack of a statute applicable to this "extraordinary case", it had the authority to order the victim to refund the restitution it had received under the now void order.

Colorado, of course, has its own "All Writs Act." § 13-1-115, C.R.S. The statute provides courts with the "power to issue all writs necessary and proper to the complete exercise of the power conferred on them by the constitution and laws of this state." In this situation, the applicable writ might be a "writ of debt" or a "writ of restitution", the latter being "A writ which lies after the reversal of a judgment, to restore a party to all that he has lost by occasion of the judgment." *Black's Law Dictionary*, 1611 (6th Ed. 1990).

Moreover, this Court has suggested that a claim for a refund of restitution already paid – although not, as here, based on dismissal of the case, but on a claim that the restitution order was illegal – is a cognizable claim under Crim. P. 35(a). *People v. Suttmiller*, 240 P.3d 504, 507 (Colo.App. 2010).

Two analogous situations are instructive, as well. *Cf. People v. Hargrave*, 179 P.3d 226, 228 (Colo. App. 2007) (holding that when the need for property seized in connection with a criminal prosecution has ended the trial court "has the jurisdiction *and the obligation* to order its return.") (emphasis added) and *Yording v. Walker*, 688 P.2d 788, 791 (Colo. 1984) (trial court's inherent

result and remedy, in spite of the legislative failure to address this circumstance.

> Despite the abundance of statutory procedures and guidelines in existence to govern the process of convicting and sentencing a defendant, no thought appears to have been given to the possibility that, in an imperfect criminal justice system, some defendants might be convicted wrongly and some sentences might be overturned or vacated. Despite that dearth of statutory authority, it remains indisputable that Marriott must repay the petitioner. Venneri paid money to Marriott as a consequence of an unconstitutional conviction, and principles of justice require no less than a full refund of that money.

Venneri, 782 F.Supp. at 1094-1095

Thus, the court held that when a defendant's conviction is vacated in a post-conviction action, "[t]he interests of justice make it imperative that the [defendant] receive a refund of his restitution." *Venneri*, 782 F.Supp. at 1093; *see also United States v. Hayes*, 385 F.3d 1226, 1229 (9th Cir. 2004) ("[A] wrongly convicted defendant whose sentence has been vacated may seek monies paid pursuant to a wrongful conviction."); *Telink v. United States*, 24 F.3d 42, 46-47 (9th Cir. 1994) (holding that "incident to the vacating

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authority "necessarily includes the authority to correct errors of law made during the course of such proceedings" and, thus, court had the authority to order a refund to defendant of his "premium payment made to the surety as a result of the trial court's erroneous grant of bail.").

and setting aside of the wrongful conviction" fines and restitution paid "would be automatically refunded, without requiring a civil action. . .").

Principles of justice and equity suggest the same result should obtain here. Just as money paid on a subsequently reversed civil judgment must be refunded, so should the restitution collected by virtue of a criminal conviction that is subsequently reversed and the case is dismissed.

CONCLUSION

For reasons stated and authorities cited, this Court should reverse the district court's ruling and remand this case with instructions to the district court to order a refund of the restitution paid by Mr. Madden.

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APPENDIX 4

SUPREME COURT,
STATE OF COLORADO

Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, CO 80203

Certiorari to the Colorado Court of Appeals
Case No. 2009CA2081
Case Number: 2013SC496

[Filed December 3, 2014]

THE PEOPLE OF THE STATE OF COLORADO	)
Petitioner	)
v.	)
LOUIS A. MADDEN	)
Respondent	)

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ANSWER BRIEF

ISSUE ANNOUNCED BY THE COURT

Whether a criminal court has jurisdiction to order a refund of costs, fees, and restitution from the State upon defendant's post-conviction motion in the criminal case following either his acquittal or his conviction being vacated and the prosecution electing not to retry him?

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SUMMARY OF THE ARGUMENT

The Court of Appeals correctly held that if a defendant's conviction is finally vacated, the district court has jurisdiction to refund the restitution he paid as part of his sentence. In so doing, the district court is exercising the jurisdiction over criminal cases conferred by the Colorado Constitution and both its inherent and statutory authority to exercise its constitutionally conferred jurisdiction.

To the extent that the Court addresses the issue, Colorado statutes suggest several funded entities who could repay Mr. Madden the $757.75 he paid for restitution as part of his sentence for the now vacated conviction.

And nothing about the General Assembly's creation of a cause of action awarding a range of benefits to "exonerated" defendants has any bearing on the question presented on certiorari.

ARGUMENT

1. Consistent with the restitution statute, other courts that have addressed the issue, common sense, and the interests of justice, the Court of Appeals correctly held that because Mr. Madden's convictions were finally vacated, the district court has jurisdiction to order return of the $757.75 he paid as part of the sentence for those now vacated convictions.

In this case and in the companion case of *People v. Nelson*, 2013 COA 58, 2013 WL 1760903, the Court of Appeals held that a person who pays restitution, fines, or costs because of a criminal conviction is entitled to recover his money when the conviction is finally overturned. In so holding, the Court of Appeals concluded that because restitution must be tied to a valid conviction, when the conviction is overturned, the criminal court in the case is authorized to award a refund of the money the defendant paid in connection with the now overturned conviction. This is more than just common sense; it is the result that the interests of justice demands.

Many other courts agree. For example in *United States v. Venneri*, the court held that when a defendant's conviction is vacated in a post-conviction action, "[t]he interests of justice make it imperative that the [defendant] receive a refund of his restitution." *United States v. Venneri*, 782 F.Supp. 1091, 1093 (D.Md. 1991). Likewise in *Telink, Inc. v. United States*, the 9th Circuit explained that if the defendants succeeded in their action to set aside their convictions the restitution and fines they paid "would be

automatically refunded, without requiring a civil action...". *Telink, Inc. v. United States*, 24 F.3d 42, 46-47 (9th Cir. 1994)); *see also Commonwealth v. McKee*, 38 A.3d 879 (Pa.Super. 2012) (after defendant's conviction overturned on appeal, trial court had jurisdiction to order refund of fines, costs, and restitution paid by defendant); *United States v. Beckner*, 16 F.Supp.2d 677, 679 (M.D.La. 1998) (court had jurisdiction to order government to repay defendant's funds that it disbursed as restitution after defendant's conviction vacated).

And consistent with this reasoning, the 5th Circuit has held the same with respect to refunding money paid as fines in connection with a conviction that is later vacated. *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973). Similarly, when, because of a due process violation, this Court reversed a defendant's conviction, it ordered a refund of the money he paid in fines and costs. *Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961).

As the Court of Appeals held in this case, principles of justice and equity require the same result here.

2. The Colorado Constitution granted the district court jurisdiction over this criminal case and both § 13-1-115, C.R.S. and the district court's inherent authority to carry out its jurisdictional mandate provide authority to order a refund of restitution when a criminal conviction is vacated.

The question on which this Court granted certiorari is whether the criminal court has jurisdiction to order

the refund of his restitution now that his conviction has been finally vacated. To the extent that the State's brief addresses this specific question, the State claims that the district court lacked jurisdiction to do so because the General Assembly did not expressly authorize it in a statute. OB at 16-21. As support the State primarily cites two inapposite cases – one concerning a civil forfeiture action[1], the other a district court ordering payment of attorney's fees as a sanction for a discovery violation.[2] The State's claim that a broad principle – "absent statutory authority, a district court lacks jurisdiction to order the return of funds" OB at 14 – derives from the narrow statute-bound holdings in these cases does not withstand even minimal scrutiny.

The holding in *$11,200.00 Currency* turned entirely on this Court's interpretation of the public nuisance statute, § 16-13-301 et. seq., C.R.S. The public nuisance statute deals with a special procedure to deem certain property a public nuisance and ordering its forfeiture. Because of various provisions specific to the "specialized trial court proceeding" authorized by the public nuisance statute, this Court held that the statute's provision for return of the forfeited property applied only upon dismissal of the criminal case at the trial stage and not if the criminal case is dismissed after appeal. *11,200.00 Currency*, 313 P.3d at 558. This Court's analysis, all of it specific to the public nuisance statute, has no bearing on the issue presented here.

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[1] OB at 14 citing *People v. $11,200.00 U.S. Currency*, 313 P.3d 554 (Colo. 2013).

[2] OB at 15 citing *People v. District Court*, 808 P.2d 831 (Colo. 1991).

Nor does this case stand for the broad principle claimed for it by the State in its brief.

Nor does *People v. District Court* provide any guidance. This Court's holding there was specific to Crim. P. 16 and whether it allowed a court to award attorney's fees as a punitive sanction for a discovery violation. *District Court*, 808 P.2d at 836. This Court did not lay down any broad principle that would offer any guidance here.

In short, neither case has anything to say about the district court's jurisdiction to return restitution Mr. Madden was ordered to pay as part of his sentence for criminal convictions that were ultimately deemed invalid.

That question is fairly simple to answer. The subject matter jurisdiction of the Colorado district court is conferred by the Colorado Constitution, not by the General Assembly. COLO. CONST., Art. VI, §9. In relevant part, that constitutional provision confers "original jurisdiction in all . . . criminal cases, except as otherwise provided herein . . .". Mr. Madden paid the restitution as a result of the district court's exercise of that very subject matter jurisdiction conferred by the Colorado Constitution: He paid $757.75 as part of the sentence imposed in his criminal case. Section 18-1.3-603 (1), C.R.S. (providing that every felony conviction shall include an order regarding restitution). And as the Court of Appeals held here and in the companion case, it is an appropriate exercise of that jurisdiction for the district court to refund restitution paid when the conviction to which it was tied is subsequently vacated.

Indeed there is ample statutory authority empowering the district court to do just that.

First, in connection with the constitutional grant of subject matter jurisdiction over criminal cases, the General Assembly has empowered the district courts to issue writs as necessary for the complete exercise of its jurisdiction.

> **Courts may issue proper writs.** The courts have power to issue all writs necessary and proper to the complete exercise of the power conferred on them by the constitution and laws of this state.

Section 13-1-115, C.R.S.; *see also People v. Hamilton*, 666 P.2d 152, 159 (Colo. 1983) (Quinn, J. concurring) (citing this statute and noting "the long-recognized principle that courts retain the power to issue warrants and other writs in connection with matters over which they have jurisdiction."); *In re People ex rel. B.C.*, 981 P.2d 145, 149 (Colo. 1998) (same).

A proper writ here to refund the money Mr. Madden paid would be a "writ of restitution", which is "[a] writ which lies after the reversal of a judgment, to restore a party to all that he has lost by occasion of the judgment." *Black's Law Dictionary*, 1611 (6th Ed. 1990). A writ to restore to Mr. Madden the money he paid "by occasion of the judgment" tracks this Court's holding in *Toland*. In that case this Court held that when a conviction is vacated, the parties should be "placed in *status quo* by refund to the defendant of the sums paid as fine and costs." *Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961) (vacating judgment of conviction for DUI entered by lower court in violation of defendant's due

process rights and ordering refund of the money that defendant paid as fines and costs).

Indeed, the federal court in *United States v. Venneri* invoked the federal counterpart to §13-1-115 – the All Writs Act[3] – to order refund of money paid by the defendant after his conviction was vacated as a result of his post-conviction petition. *United States v. Venneri*, 782 F.Supp. 1091, 1093 (D.Md. 1991). Because, like here, the situation was not otherwise covered by statute, the Court held that the All Writs Act authorized the court to order refund of the restitution paid by the defendant; a refund that the interests of justice made "imperative." *Venneri*, 782 F.Supp. at 1093. Indeed, the Court held that despite the "dearth of statutory authority . . . principles of justice require no less than a full refund of that money." *Id.* 782 F. Supp. at 1094-95.

Other federal courts as well have relied on the All Writs Act as authority requiring the government to refund restitution paid by a defendant when his conviction is subsequently vacated, even if the funds have been disbursed. *United States v. Beckner*, 16 F.Supp.2d 677 (M.D. La. 1998). Like the Court of Appeals here, the *Beckner* court found the reasoning of the 5th Circuit regarding refund of fines paid in connection with a subsequently vacated conviction persuasive. *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) ("We can see no reason why a person who has paid a fine pursuant to an unconstitutional statute should be required to resort to a multiplicity of

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[3] 28 U.S.C. § 1651 (a) authorizing courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

actions in order to obtain reimbursement of money to which he is entitled. Since the district court was empowered to set aside the conviction, it could also correct the unlawful result of the conviction and require the repayment of the money collected as fines.").

In *Beckner*, *Venneri*, and *Lewis*, the government argued, just like the State here, that the court lacked "jurisdiction" to refund the money because of the lack of any statute specifically addressing refund. The courts all squarely rejected that argument, the former two relying on the federal counterpart to § 13-1-115, and the 5th Circuit in *Lewis* simply relying on the court's inherent authority:

> The Government says that the appellants cannot recover in any event or by any existing remedial procedure because there is no express statutory authority for such relief. Just as the imposition of a fine is an incident of a criminal conviction, so is the direction for repayment an incident to the vacating and setting aside of the conviction.

United States v. Lewis, 478 F.2d at 836.

This Court, as well, has relied on the district court's inherent authority to order a surety to refund money to a defendant even though there was no specific statutory authority to do so. *Yording v. Walker*, 688 P.2d 788, 791 (Colo. 1984). In so holding, this Court held that the district court's inherent authority "necessarily includes the authority to correct errors of law" made during a criminal prosecution. Thus, because the court's error of law caused the defendant to pay the surety, it could correct its error by ordering a

refund. *Id.*, *see also Cooper v. Gordon*, 389 So.2d 318, 319 (Fla. App. 1980) (after defendant's conviction reversed on appeal, court retained jurisdiction to refund restitution and fines paid by defendant "as part of its inherent power to correct the effects of its own wrongdoing and restore [defendant] to the status quo ante.").

It is this same inherent power that the Court of Appeals cited in *Hargrave*, holding that the district court had ancillary jurisdiction to hear and rule on the defendant's motion for return of property seized (but no longer needed) in connection with a criminal prosecution. *People v. Hargrave*, 179 P.3d 226, 230-12 231 (Colo. App. 2007) (also cited with approval in the companion case, *People v. Nelson*, *supra*.). And that inherent power also included the authority to, if necessary, order payment to the defendant of the storage charges he would have to pay in retrieving his seized property. *Id.*

Moreover, at least one other division of the Court of Appeals has held that a motion for a refund of restitution is a cognizable postconviction claim under Crim. P. 35(a). *People v. Suttmiller*, 240 P.3d 504, 507 (Colo. App. 2010) (so holding because restitution is part of the sentence and therefore a claim for a refund is a challenge to the legality of the sentence). Indeed, holding this to be a cognizable postconviction 35(a) claim logically follows from this Court's holding in *Roberts v. People*, 130 P.3d 1005 (Colo. 2006) (by asserting claim that court could not award prejudgment interest as part of its restitution order, defendant presented an issue as to the legality of his sentence).

Roberts is also instructive in that this Court held that the district court had the authority to set the pre-judgment interest rate for its restitution award, even though the restitution statute had no provision granting authority to do so. *Roberts*, 130 P.3d at 1010. The district court can do so even without specific statutory authority because "[r]estitution in a criminal case is part of the sentencing process." *Id.* From this reasoning it follows that the district court needs no specific statutory authority (beyond that discussed above) to order a restitution refund, as well.

Finally, as cited by the Court of Appeals in the companion case to this one, resolving this claim in same criminal case is consistent with Crim. P. 57(b) which provides that "[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these Rules of Criminal Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in the criminal courts, and shall look to the Rules of Civil Procedure and to the applicable law if no Rule of Criminal Procedure exists." *People v. Nelson*, *supra*, quoting Crim. P. 57(b). This Rule's reference to civil rules is notable, in that it is well-settled that when a civil judgment is reversed on appeal or by a post-judgment order, any money paid in connection with the judgment must be refunded in the same case without requiring a separate action. *E.g.*, *Century Bank v. Hymans*, 905 P.2d 722, 726-727 (N.M.App. 1995) ("When a party pays a judgment and the judgment is then reversed or modified on appeal or by post-judgment order, the payor can obtain restitution without bringing a new action; it may move the trial or appellate court for relief, or the court may grant relief

of its own initiative."); *P.B. v. T.D.*, 561 N.E.2d 749, 751 (Ind. 1990) (same); *West Suburban Bank v. Lattemann*, 674 N.E.2d 149, 151 (Ill.App. 1996)(same); *Moore v. Baugh*, 308 N.W.2d 698, 700 (Mich.App. 1981) (same); *Spangler Inc. v. House of Heavilin, Inc.*, 394 S.W.2d 561 (Mo.App. 1965) (same); *see also Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149, 1153 (Colo.App. 1993) (observing that ". . .a person who has paid money to another in compliance with a judgment which is reversed or set aside is entitled to restitution. . ."). Thus, ordering return of the money paid here is also consistent with the restitution order's initial status as a civil judgment in favor of the state.[4]

In sum, a district court has jurisdiction over this restitution issue and the concomitant authority to order restitution refunded when the defendant's conviction is vacated. The court's subject matter jurisdiction over criminal cases derives from the Colorado Constitution. By refunding the restitution paid – whether under its inherent authority, or by issuing a writ under § 13-1-115 – the court is simply exercising its constitutional grant of subject matter jurisdiction.

And because the district court has this authority as a proper exercise of its constitutionally-conferred subject matter jurisdiction, the State's claim of a violation of the separation of powers doctrine – OB at 19-21 – is baseless. The district court has both the constitutional and statutory authority as well as the inherent power in furtherance of exercising its jurisdiction to return Mr. Madden's money. COLO.

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[4] § 18-1.3-603 (4)(a), C.R.S.

CONST., Art. VI, §9; § 13-1-115, C.R.S.; *People v. Hamilton, supra*.

Moreover, to the extent the State bases this "separation of powers" argument on § 13-65-101 et. seq. its argument fails. For reasons stated in Argument 3 *infra*, this statute has nothing to do with the issue presented. Nowhere in the statute does the General Assembly say that only an "exonerated person" can recover his restitution. Nor has the General Assembly declared that this statutory cause of action is the exclusive means by which to do so.

3. The General Assembly's creation of a cause of action providing a wide range of compensatory damages to defendants who can prove "actual innocence," neither established exclusive means for a defendant to recoup the restitution he or she paid nor does it show legislative intent to deny refunding restitution to other defendants whose conviction is finally vacated.

The State hinges much of its argument on the fact that the General Assembly enacted legislation in 2013 creating a civil action for persons who were convicted of a felony to seek a range of compensation if he or she can prove "actual innocence" in a special civil action. OB at 11-13 citing § 13-65-101 et. seq., C.R.S. Because the several types of compensation provided for in this statutorily-created cause of action incidentally includes the restitution paid by the exonerated person, the State claims we can "presume" that the General Assembly therefore intends to deny refund of restitution to anyone else. This is nonsense.

The statute provides for a broad range of compensation to such person, including, *inter alia*, college tuition waivers for the person and his children, compensation for child support owed during incarceration, and $70,000.00 for each year of incarceration. Section 13-65-103, C.R.S. The statute says nothing about others whose convictions are vacated on appeal or otherwise. Indeed, nowhere in the statute is there a legislative mandate restricting even the exonerated person from seeking a refund of his restitution in the same criminal case. Nor does the statute state it is the exclusive remedy available. *C.f. Vaughn v. McMinn*, 945 P.2d 404, 408 (Colo. 1997) (By enacting statute raising the penalty for a bad faith cause of action, legislature did not directly state or imply that award of penalty to injured claimant precludes common law bad faith claim; absent an explicit legislative mandate restricting claimant to the statutory penalty, the statute does not restrict claimant's means of redress). The existence of a statute awarding compensation (that happens to include restitution) to a certain class of people with vacated convictions does not restrict recovery of restitution by others with vacated convictions. If the General Assembly so intended, it would expressly say so. But it did not. The statute neither says this is the exclusive class of people entitled to recover restitution nor does it say this is the exclusive means of recovering it. And because the statute has no such language the State's "legislative intent" argument fails. *Compare Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70 (Colo. 1998) (creation of a statutory remedy does not bar preexisting common law rights of action, in absence of clear legislative intent to negate common law right); *Vaughn v. McMinn*, 945 P.2d 404 (Colo. 1997) (General

Assembly's creation of statutory remedy does not bar pre-existing common law rights of action unless legislature expressed its intent to do so); *Brooke v. Restaurant Services, Inc.* 906 P.2d 66 (Colo. 1995) (creation of a private right of action by state statute does not bar pre-existing common-law rights of action unless legislature expressed its intent to do so); *Collard v. Hohnstein*, 174 P. 596 (Colo. 1918) (A remedy provided by one statute does not abolish that given by another or by the common law, unless specifically so provided); *Showpiece Homes Corp. v. Assurance Co. of America*, 38 P.3d 47, 52-53 (Colo. 2001) ("Nothing in the UCDPA indicates that it is intended to be the exclusive remedy for deceptive trade practices. . .); *with Vigil v. Franklin*, 103 P.3d 322, 328 (Colo. 2004) ("express, unambiguous language of subsection (2) of Colorado's premises liability statute" that uses the language "any civil action brought against a landowner by a person who alleges injury while on the real property of another" shows General Assembly's intent to completely occupy the field and supersede existing law) and *Build It and They Will Drink, Inc. v. Stauch*, 253 P.3d 302 (Colo. 2011) (dram shop statute provides exclusive remedy because it states "this section shall be interpreted so that any common law cause of action against a vendor of alcohol beverages is abolished").

Moreover, to the extent that the statute manifests a legislative intent to draw a distinction between those convictions vacated for the limited reasons covered by the statute and convictions vacated for all other reasons – OB at 12 – it manifests that distinction by its providing an extensive range of compensation well beyond just a restitution refund for the persons in the former category. Indeed, providing a refund of

restitution is an incidental part of the statute's broad provisions of compensatory awards.

For example, consider the "legislative intent" claims the State makes for § 13-65-101 in the context of some other statutorily created causes of action. By creating a cause of action for treble damages against a landlord, does the Security Deposit Act[5] evince a legislative intent that only a tenant who can establish the statute's specified circumstances can recover the amount of the security deposit money held by his landlord? Or by creating an action for certain enhanced damage awards against an employer does the Wage Claim Statute[6] evince a legislative intent that only an employee who can establish the statute's specified circumstances can recover the principal amount of wages owed to her? Does the Motor Vehicle Repair Act[7] by creating an action for treble damages against a car mechanic evince a legislative intent that only a customer who can establish he overpaid for repairs in one of the ways prohibited by the statute can recover

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[5] § 38-12-103, C.R.S. (establishing a cause of action for an award of three times the amount of the security deposit plus attorney's fees if the landlord fails to specify reasons for retaining a tenant's security deposit within a specified time period, and fails to return it after a 7 day notice of intent to sue).

[6] § 8-4-109, C.R.S. (establishing a cause of action for an award of wages owed, plus an additional percentage if the employer refuses to pay wages owed after a written demand and if his failure to pay is willful).

[7] § 42-9-113 and 42-9-111, C.R.S. (establishing a cause of action for, *inter alia*, an award of three times the amount of the customer's payment for repairs in excess of the amount allowed by the statute after a 10 day demand for damages sent by certified mail).

his money? No, these statutes evince no such legislative intent. Like § 13-65-101, each of these special causes of action created by statute simply evinces a legislative intent to award a broader range of compensation to tenants, employees, customers, or criminal defendants who are situated in the particular circumstances specified therein. These statutes neither provide the exclusive means to recover the principal amount at issue in each circumstance – i.e. money representing the deposit, the wages, the repair bill, or the restitution – nor do they evince a legislative intent to deny recovery of the principal amount to all who are not so situated.

In short, the existence of this statute creating a special cause of action has nothing to do with the issue presented for review.

4. To the extent that this Court addresses a matter that is not within the scope of the issue on which this Court granted certiorari in this case, several statutes suggest state agencies or entities that could be ordered to refund the $757.75 Mr. Madden paid as restitution and that have funds allocated from the General Assembly to do so.

The remainder of the State's brief – OB at 22-49 – argues about who must return Mr. Madden's money to him. The Court of Appeals' decision here, suggested that such a refund could come from "the state." Slip op. at 1. (citing *Nelson*, *supra*). The Court of Appeals did not specify which entity of the State should reimburse Mr. Madden or if the burden should fall on the judicial branch, the executive branch some other sub-agency of

either. These are all matters beyond the scope of the question on certiorari in this case. That question asks only if the district court had jurisdiction to order refund restitution paid, now that Mr. Madden does not stand convicted in the case in which he was ordered to pay it.

But to any extent that this Court addresses this issue in this case, several options make sense. First, when criminal charges are brought to trial but do not result in a conviction § 16-18-101 provides that costs "shall be paid by the state pursuant to section 13-3-104, C.R.S." And § 13-3-104 provides, in turn, that the State "shall provide funds" for, *inter alia*, "the operations . . . and other expenses of all court of record within the state. . .". Thus, although specific to "costs", this statutory scheme suggests the principle that when no valid conviction results from a criminal prosecution that the funds expended should be borne by "the state." And, second, these statutes provide the judiciary with the funds necessary to bear that expense as part of the court's "operations" or "other expenses."

Additionally, defendants who are unable to pay restitution immediately upon conviction pay through the "collections investigator" – and thus must additionally pay the "time payment fee".[8] Section 16-18.5-104 (1) and (2), C.R.S. These fees are credited to

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[8] If, as the State suggests, a defendant whose conviction is vacated can only have the remainder owed for restitution vacated prospectively – OB at 13-14 – a defendant who paid restitution in full upon conviction would get no relief when his conviction is vacated but one who had a time payment plan would be relieved of the unpaid balance. If there is an equitable or even rational reason for this disparate treatment of the two, the State does not suggest what that may be.

"the judicial collection enhancement fund"; a fund that is created by statute in the state treasury. Section 16-11-101.6 (2), C.R.S. By statute, the General Assembly must fund the judicial department for, *inter alia*, "administrative . . . costs incurred in collecting restitution, fines, costs, fees and other monetary assessments." *Id.* Moreover, the statute provides for all funds so allocated by the General Assembly to, at the end of the fiscal year, "remain in the fund for appropriation to the judicial department for, *inter alia*, "ongoing enforcement and collection of restitution, fines, fees, costs surcharges, and *any other monetary assessments*." *Id.* (emphasis added). This also suggests an appropriately funded entity to bear responsibility for returning the money paid by Mr. Madden as restitution.

These are among the funded state agencies and entities that the district court could order to return Mr. Madden's $757.75 in restitution.

Finally, the State's complaint about lack of "procedures" for "processing refunds of restitution" has no bearing on the issue before this Court. OB at 34-35. Any perceived difficulty neither divests the court of jurisdiction nor prevents it from ordering a refund. *C.f Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (courts have flexibility to shape equitable remedies); *Garrett v. Arrowhead*, 826 P.2d 850, 855 (Colo. 1992) ("The purpose of a court sitting in equity is to promote and achieve justice with some degree of flexibility."). Indeed, the flexibility that equity affords "extends to conditions as they are at the close of litigation" and allows courts to "see the litigation through in such manner as would achieve full justice." *Meredith v.*

Ramsdell, 384 P.2d 941, 945 (Colo. 1963). Any difficulty with "processing refunds" should not thwart the result that justice requires and that the district court has the constitutional authority to achieve.

CONCLUSION

For reasons stated, Mr. Madden respectfully requests this Court affirm the judgment of the Court of Appeals.

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